OFFICE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 387

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, PETITIONER,

vs.

HOOSIER CARDINAL CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 23, 1965
CERTIORARI GRANTED OCTOBER 11, 1965

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 387

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, PETITIONER,

vs.

HOOSIER CARDINAL CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Seventh Circuit		
Appellant's appendix consisting of portions of the record from the United States District Court for the Southern District of Indiana, Evansville Division	1	1
Docket entries	1	1
Complaint	3	3
Exhibit A—Excerpt from Collective Bargaining Contract—Article VIII—Vacations	5	5
Defendant's motion to dismiss plaintiff's complaint	8	8
Affidavit of T. J. Morton, Jr. in support	11	11
Opinion and order, Steckler, J.	12	12
Notice of appeal	23	24
Opinion, Schnackenberg, J.	24	24
Concurring opinion, Swygert, J.	29	29
Judgment	30	29
Clerk's certificate (omitted in printing)	31	30
Order allowing certiorari	32	30

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 28, 1965

[fol. 1]

Appellant's Appendix—Filed February 15, 1965

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

No. EV 64-C-29

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, Plaintiff,

v.

HOOSIER CARDINAL CORPORATION, an Indiana Corporation, Defendant.

DOCKET ENTRIES

1964

Apr. 8. Complaint filed, summons issued.

May 4. Kahn, Dees, Donovan & Kahn file appearance for the defendant; defendant filed motion to dismiss; brief in support thereof, request for oral argument and proof of service.

May 18. U. S. Marshal returns summons; served April 13, 1964.

July 27. Cause assigned for oral argument and hearing upon defendant's motion to dismiss on August 27, 1964, at 2:00 P.M. in Room 203, U. S. Courthouse, Indianapolis, Indiana; thirty minutes is allotted each side for argument (SE).

[fol. 2]

Aug. 27. Hearing held on defendant's motion to dismiss; arguments of counsel heard and Court takes matter under advisement; counsel for plaintiff allowed ten days in which to file a post-argument brief and the defendant is granted 10 days thereafter to file a post-argument answer brief. (SE)

Sept. 4. Plaintiff filed post argument brief with c/s.

Sept. 14. Defendant filed reply brief in support of its motion to dismiss complaint with p/s.

Nov. 12. Court overrules defendant's motion to dismiss as to the first ground thereof, that there is no federal jurisdiction over the subject matter of the action, but sustains said defendant's motion to dismiss complaint on the second ground of said motion; ordered, adjudged and decreed that plaintiff's complaint be dismissed on the ground that the complaint fails to state a claim against the defendant upon which relief can be granted; costs taxed against the plaintiff. (SE) O.B. Vol. IV, page 86.

Nov. 25. Plaintiff filed notice of appeal, with c/s; copy mailed to Kahn, Dees, Donovan & Kahn, 905 So. Securities Building, Evansville, Indiana.

Dec. 3. Plaintiff filed appeal bond in the sum of $250.00 with the Reliance Insurance Company as surety thereon.

Dec. 22. Court Reporter files original and copy of transcript of oral argument heard on August 27, 1964.

Dec. 30. Transcript on appeal and transcript of oral argument heard on August 27, 1964, mailed to Clerk U. S. Court of Appeals, Chicago, Illinois.

Dec. 31. Clerk U. S. Court of Appeals, acknowledges receipt of transcripts.

[fol. 3]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed April 8, 1964

Plaintiff, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW-AFL-CIO, an unincorporated labor organization shows unto the Court as follows:

1. The plaintiff is an unincorporated labor organization having its principal office in Detroit, Michigan and exercising the usual functions of a labor organization throughout the United States and Canada and specifically having local unions chartered by the International Union, in the State of Indiana in the Southern District of Indiana and such International Union represents employees of industries affecting commerce.

2. The defendant, Hoosier Cardinal Corporation is a corporation organized and existing under the laws of the State of Indiana and having a resident agent within the jurisdiction of the Evansville Division of the United States District Court for the Southern District of Indiana and such corporation is engaged in an industry affecting commerce.

3. This action is brought by the plaintiff under the provisions of Section 301 of the Labor Management Relations Act, 1947, as amended, Title 29 U.S.C., Section 185 et seq. Jurisdiction of this cause is vested in this Court by virtue of said Act of Congress.

4. That on or about the 1st day of September 1955, the plaintiff and its Local Union No. 145 entered into a collective bargaining contract with the defendant corporation, a copy of which contract is filed herewith, incorporated herein and is marked Plaintiff's Exhibit "A."

5. Article VIII of said agreement provides in part: "Vacation pay shall be granted on the following basis:

a. Each hourly rated employee—shall be entitled to Forty (40) hours vacation with pay;

[fol. 4]

b. Each hourly rated employee (with 3-10 years service) shall be entitled to Eighty (80) hours vacation with pay.

d. Each hourly rated employee (who has more than Ten years service) shall be entitled to One Hundred Twenty (120) hours vacation with pay."

The aforesaid article further provides that all employees who have either worked at least 1000 hours during the preceding twelve months or who have certain seniority rights as described in Article VIII shall be guaranteed vacation pay; that said vacation pay is to be based on the average wages of each employee during the preceding twelve months.

6. That following the 1st day of January, 1957 and prior to the 1st day of June, 1957, certain employees of the defendant corporation, all of whom were represented for the purposes of collective bargaining by the plaintiff, earned vacation pay according to the aforesaid Article VIII of the collective bargaining agreement and the names of such employees together with the amounts earned are all shown in plaintiff's Exhibit "B" which is now filed and made a part of this complaint.

7. That on or about the 1st day of June, 1957, the defendant corporation discontinued employment of the employees whose names are set out in the aforesaid Exhibit "B" and has since said date refused to pay such employees any of the accumulated vacation pay which is now due and owing.

8. The plaintiff has demanded payment of such vacation wage pay but the defendant has consistently refused to make such payments.

9. That the plaintiff does not have possession of the pay records of the employees of the defendant but such records are in the possession of the defendant and that this plaintiff has no access to said records. The plaintiff

further says that the records will show the defendant indebted in the amounts exceeding Forty Thousand Dollars ($40,000.00) owing to employees represented by the plaintiff.

[fol. 5] 10. That pursuant to the Acts of the General Assembly for the State of Indiana for the year 1911, Chapter 68, Sections 1 and 4 thereof and in accordance with the Acts of the General Assembly for the year 1933, Chapter 47, Section 2, there is due to the employees represented by the plaintiff an amount equal to double unpaid wages which amount is in excess of Eighty Thousand Dollars ($80,000.00).

Wherefore, the plaintiff asks judgment against the defendant corporation in the amount of Forty Thousand Dollars ($40,000.00) together with liquidated damages in the amount of Eighty Thousand Dollars ($80,000.00) together with a reasonable fee for plaintiff's attorney together with its costs and prays that the plaintiff may have such further relief as to the Court seems just.

Lynnville G. Miles, Attorney for Plaintiff, 605 Union Title Building, Indianapolis, Indiana.

EXHIBIT A TO COMPLAINT

(The entire collective bargaining contract, filed as Exhibit A to the Complaint, is in the record. Printed here is the pertinent paragraph of the Agreement, Article VIII.)

Article VIII

Vacations

36. Vacations shall be granted on the following basis:

a. Each hourly rated employee, regardless of length of service, who has worked a total of 1000 hours or more during the preceding twelve (12) month period as defined in paragraph 38-b, shall be entitled to forty (40) hours vacation with pay.

b. Each hourly rated employee who has one (1) year but less than three (3) years' seniority on his seniority anniversary date of the current vacation [fol. 6] year, and who has been in receipt of earnings in at least fifty (50%) percent of the Company's pay periods or worked a total of 1000 hours or more during the preceding twelve (12) month period as defined in paragraph 38-b, shall be entitled to forty (40) hours vacation with pay.

c. Each hourly rated employee who has three (3) years but less than ten (10) years seniority on his seniority anniversary date of the current vacation year, and who has been in receipt of earnings in at least fifty (50%) percent of the Company's pay periods or worked a total of 1000 hours or more during the preceding twelve (12) month period as defined in paragraph 38-b, shall be entitled to eighty (80) hours vacation with pay.

d. Each hourly rated employee who has ten (10) years or more seniority on his seniority anniversary date of the current vacation year and who has been in receipt of earnings in at least fifty (50%) percent of the Company's pay periods or worked a total of 1000 hours or more during the preceding twelve (12) month period as defined in paragraph 38-b, shall be entitled to one hundred and twenty (120) hours vacation with pay.

37. The full amount of vacation pay to which each employee is entitled shall be paid the employee on the last regular pay day preceding his vacation period.

38. a. Each hour of vacation pay shall be computed on the basis of an employee's average earnings during the preceding year.

b. Vacation time and pay shall be computed from the identical period for which the W-2 forms are calculated.

39. Employees who are laid off during the vacation periods and are entitled to a vacation with pay may receive their vacation check at the time they are laid off.

40. Employees who qualified for a vacation in the previous year and whose employment is terminated for any [fol. 7] reason before the vacation is taken will be paid that vacation at time of termination. In case of death any unpaid vacation money will be paid to the widow or family of the deceased employee. In case such eligible employee quits, he must give the Company two (2) days written notice in order to receive such vacation pay.

41. The amount of vacation to which an employee is eligible shall be determined at the time of his layoff or termination. If an employee on such layoff is recalled to work during the vacation year and during such layoff his anniversary date occurs, he may be eligible for additional vacation time.

42. Employees entitled to vacations with pay cannot waive vacations and add vacation time and pay to the following year's vacation.

43. a. The vacation period shall begin January 1st and end on December 31st of each year during the term of this Agreement. Vacations must be taken during this period and are subject to the approval of the employee's supervisor, with due consideration of the employee's wishes and the most efficient operation of the plant.

b. A two week vacation period by the Cardinal and the Hoosier Divisions either singly, separately or jointly may be scheduled during the summer months provided at least sixty (60) days prior notice is given of such date.

c. Employees may be allowed to begin their vacation on any day of the week.

EXHIBIT B TO COMPLAINT

(Exhibit B to Complaint, the list of employees discharged, is in the record on file with the Court. As it is not pertinent to the matters before the Court, it is not reprinted here.)

[fol. 8]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT —Filed May 4, 1964

The defendant, Hoosier Cardinal Corporation, respectfully moves the Court to dismiss the above entitled cause of action for the following reasons, and each of them, to-wit:

1. The complaint herein shows no federal jurisdiction over the subject matter of the action by reason of the following:

(a) Section 301 of the Labor Management Relations Act of 1947, as amended, Title 29 U.S.C. Section 185, confers no jurisdiction upon this Court, or federal courts, to entertain this action by said plaintiff labor union for and on behalf of its individual members to enforce the alleged rights of the individual former employees of the defendant based upon the defendant's alleged failure to comply with the terms of the collective bargaining agreement relating to compensation, all of which appears on the face of the complaint filed in this cause.

(b) The complaint on its face shows that the real parties in interest are the individual former employees of the defendant mentioned in the plaintiff's complaint and that the plaintiff labor union is seeking to enforce uniquely personal rights of the individual former em-

ployees, namely for vacation pay alleged to be due each individual former employee from the defendant company, and that the plaintiff union is not claiming any pecuniary interest in the vacation pay alleged to be due to the individual former employees of the defendant, nor is the plaintiff union seeking to recover from the defendant any other damages or to enforce any other rights as to which it, as such, has any interest or alleged claim whatsoever.

[fol. 9] (c) It appears upon the face of the complaint that the plaintiff labor union is an unincorporated association and under the law of the State of Indiana such unincorporated association has no capacity to bring an action as a party plaintiff.

(d) It appears upon the face of the complaint that the plaintiff union has not, as such, suffered any alleged damages and is not, as such, seeking damages against the defendant herein and, therefore, the matter in controversy between the plaintiff and the defendant does not exceed, exclusive of interest and costs, the sum of $10,000.00 as required by Title 28 U.S.C. Section 1332, as amended.

2. The complaint fails to state a claim against the defendant upon which relief can be granted for the following reasons:

The complaint shows on its face that the plaintiff union is seeking to recover vacation pay on behalf of certain individuals who are former employees of the defendant, a list of which former employees is attached to the complaint as Exhibit B. It also is seeking to recover double damages for said employees and attorney fees. It is alleged that the vacation pay was earned according to a collective bargaining agreement entered into between the plaintiff and its Local Union No. 145 and the defendant on or about September 1, 1955, a copy of which agreement is attached to plaintiff's complaint as Exhibit A. The complaint on its face shows that what the plaintiff is, in effect,

trying to do is to recover vacation pay on each individual former employee's separate cause of action under said employee's oral employment contract with the defendant, as shown by the affidavit hereinafter referred to.

The complaint shows on its face that the breach, if any, on the part of the defendant occurred on or about the 1st day of June, 1957 when the defendant corporation discontinued employment of all the former employees named in Exhibit B and since said date has refused to pay any such employees accumulated vacation pay.

[fol. 10] The complaint, therefore, shows that the alleged causes of action of the individual former employees which the plaintiff is seeking to enforce arose more than six years prior to the commencement of this action and that the claim for vacation pay would be a breach of the oral employment contract of each employee and is, therefore, barred by the statute of limitations of the State of Indiana by Burns' Indiana Statutes, 1946 Replacement, Section 2-601 (Supp.). This statute provides no action shall be brought on a contract not in writing after six years.

In support of this motion the defendant will rely upon the affidavit of T. J. Morton, Jr. that the employment contract with each former individual employee of the defendant mentioned in Exhibit B attached to the complaint herein was an oral or verbal employment contract and none of said former employees had a written contract with the defendant. Said affidavit is attached hereto, made a part of this motion and marked "Exhibit No. 1".

Kahn, Dees, Donovan & Kahn, Attorneys for Defendant, 905 Southern Securities Building, Evansville, Indiana 47708.

May 4, 1964.

[fol. 11]

AFFIDAVIT OF T. J. MORTON, JR., IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

State of Indiana,
County of Vanderburgh—ss.

T. J. Morton, Jr., being first duly sworn upon his oath deposes and says:

1. That he is now and was at all times mentioned in the plaintiff's complaint filed in the above entitled cause of action and since about the year 1928 has been continuously the president of the defendant, Hoosier Cardinal Corporation, an Indiana corporation with its principal office in the City of Evansville, Indiana, or its predecessor, Hoosier Lamp & Stamping Corporation; that he has personal knowledge of the facts herein set forth and makes this affidavit in support of the attached and foregoing motion of said defendant, Hoosier Cardinal Corporation, to dismiss plaintiff's complaint and cause of action filed herein.

2. That all of the former employees of the defendant whose names appear on Exhibit B attached to plaintiff's complaint and for whom the plaintiff herein is seeking to recover vacation wages, were originally and at all times from the date of their employment continuously employed by the said defendant under verbal or oral contracts of employment and that none of said former employees at any time prior to their discharge by the defendant herein on or about June 1, 1957 were ever employed under any written employment contract with the defendant.

More affiant saith not.

T. J. Morton, Jr.

Subscribed and sworn to before me, the undersigned Notary Public in and for said county and state, this 1st day of May, 1964.

....., Notary Public, Vanderburgh County, Indiana.

My commission expires .....

[fol. 12]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF INDIANA

EVANSVILLE, INDIANA

OPINION AND ORDER—Filed November 12, 1964

This cause comes on before the Court on the motion of the defendant, Hoosier Cardinal Corporation, to dismiss the above entitled cause of action on two grounds:

The first ground is that the complaint herein shows on its face that there is no federal jurisdiction over the subject matter of the action.

In support of this part of its motion, the defendant claims that Section 301 of the Labor Management Relations Act of 1947, as amended, Title 29 U.S.C. Section 185, confers no jurisdiction upon this Court, or federal courts generally, to entertain an action brought by the plaintiff labor union for and on behalf of certain of its individual members to enforce such individual member's personal rights or action for alleged vacation pay claimed to be due by reason of the collective bargaining agreement between the plaintiff union and the defendant company; that the Court does not have jurisdiction because the plaintiff labor union is an unincorporated labor association and as such has no capacity under Indiana law to bring an action as a party plaintiff, and that the complaint shows on its face that the plaintiff union has not suffered any damages, as such, and that the matter in controversy does not exceed, exclusive of interest and costs, the sum of $10,000.00, as required by Title 28 U.S.C. Section 1332, as amended.

The second ground of defendant's motion to dismiss is that the complaint fails to state a claim against the defendant upon which relief can be granted.

In support of this ground of its motion the defendant asserts that the complaint shows on its face that the plaintiff union is seeking to recover vacation pay on behalf of and for certain individuals who are former employees of the defendant. A list of such former employees is at-

tached to the complaint as Exhibit B. It also seeks to recover on behalf of said employees double damages and [fol. 13] attorney fees. The alleged vacation pay is alleged to have been earned according to a collective bargaining agreement entered into between the defendant and plaintiff's Local Union No. 145 on or about September 1, 1955, a copy of which agreement is attached to plaintiff's complaint as Exhibit A. The motion to dismiss is supported by the affidavit of an official of the defendant which shows that each individual former employee was employed by the defendant under an oral employment contract. This action, therefore, is an attempt by the union to recover on behalf of certain individuals alleged vacation pay on each said individual former employee's alleged separate cause of action under each employee's oral employment contract with the defendant. The defendant further alleges that the complaint on its face shows that the breach, if any, on the part of the defendant of the verbal employment contracts with the individual former employees occurred on or about the 1st day of June, 1957 when the defendant corporation discontinued employment of all of the former employees named in the complaint and since said date has refused to pay any such employee alleged accumulated vacation pay. Finally, the defendant, in support of its motion to dismiss under this part, states that the complaint shows that the alleged cause of action of the individual former employees which the plaintiff is seeking to enforce on their behalf arose more than six years prior to the commencement of this action. Further, that such claims for alleged vacation pay would result from an alleged breach of an oral employment contract of each employee and would, therefore, be barred by the statute of limitations of the State of Indiana. *Burns Indiana Statutes, 1946 Replacement, Section 2-601 (Supp.),* which provides that no action shall be brought on a contract not in writing after six years. The plaintiff's complaint in this case was filed on April 8, 1964, which would be more than six years from June 1, 1957, when the alleged breach, if any, of employment contract with the individual employees occurred.

As noted above, the defendant filed the affidavit of the president of the defendant corporation in support of its motion to dismiss, in which it is stated that each individual [fol. 14] former employee was originally and at all times since the date of employment continuously employed by the defendant solely under an oral or verbal employment contract, and that none of said employees prior to their discharge on June 1, 1957 was ever employed under any written employment contract. Rule 12 of the Federal Rules of Civil Procedure provides that a motion to dismiss supported by matters outside the pleading, if not excluded by the Court, shall be treated as a motion for summary judgment. In this case the same results would obtain whether the motion was considered as a motion to dismiss or as a motion for summary judgment because this cause can be, and is, disposed of without the necessity of the affidavit in support of said motion to dismiss and on matters appearing on the face of the complaint unsupported thereby. Further, this cause was fully briefed by both plaintiff and defendant and oral argument and hearing thereon was held before the Court after due notice to both parties and no counter-affidavits to said motion were filed by the plaintiff herein.

And the Court having examined the plaintiff's complaint, defendants' motion to dismiss, the briefs in support thereof and in opposition thereto, and having taken the matter under advisement, and now being duly advised in the premises overrules said defendant's motion to dismiss as to the first ground thereof, that there is no federal jurisdiction over the subject matter of the action, but now sustains said defendant's motion to dismiss said complaint on the second ground of said motion, namely, that the complaint fails to state a claim against the defendant upon which relief can be granted.

If the defendant's motion, by reason of the affidavit attached, is considered a motion for summary judgment of the defendant as to the second ground of said motion to dismiss then in the alternative such motion for summary judgment is hereby sustained.

The Court in reaching its decision herein in the disposition of defendant's motion to dismiss has given serious consideration to the briefs and arguments of the parties. [fol. 15] The defendant in support of the first ground of its motion to dismiss, that the complaint shows no federal jurisdiction over the subject matter of the action, argues that Section 301 of the Labor Management Relations Act of 1947, as amended, Title 29 U.S.C. Section 185, confers no jurisdiction on this or any other federal court to entertain this action by the plaintiff labor union for and on behalf of its individual members to enforce the alleged uniquely personal rights of the individual former employees of the defendant to recover alleged vacation pay, inasmuch as these rights flow directly to the former individual employees under their individual verbal employment contracts with the defendant and did not flow to or inure to the benefit of the plaintiff union. The defendant argues that the complaint shows on its face that the vacation pay sought to be recovered is a uniquely personal right of the defendant's former individual employees and that this brings this case squarely within the decision and authority of *Local Lodge 2040, International Association of Machinists* v. *Servel, Inc.*, (1959), 7 Cir., 268 F. 2d 692, and in the holding of the Supreme Court of the United States in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, (1954), 348 U.S. 437, 75 S. Ct. 489. The facts in the Servel case were almost identical with the facts in this case, in which the Court held that a labor union seeking to recover alleged vacation pay for former employees of Servel, Inc. and not seeking to recover anything upon behalf of itself, could not recover on the uniquely personal rights of the former employees and that Section 301 of the Labor Management Relations Act of 1947, as amended, did not confer federal jurisdiction on the district court to entertain the action by the plaintiff union for recovery of alleged vacation pay of its individual members. The Servel case was based upon the Supreme Court's decision in the Westinghouse case cited above, which also held that the federal court did not have

jurisdiction in an action by a labor union to enforce uniquely personal rights of the individual employees which it represented and that such action belonged to the individuals and not the union.

[fol. 16] The defendant in its brief, although admitting that the Westinghouse case and perhaps the Servel case had been questioned by the Supreme Court of the United States in the case of *Smith* v. *Evening News Association,* (1962), 371 U.S. 195, 83 S. Ct. 267, nevertheless argued that these cases were not overruled by the Supreme Court in its decision and that anything which the Court may have stated in the Smith case with reference to the Servel or Westinghouse cases was purely dicta; also, that these cases were not necessarily overruled and that as to the particular question involved here the Servel and Westinghouse cases were determinative of this question.

The plaintiff on the other hand maintains that Smith v. Evening News Association expressly overruled Westinghouse and that under the Smith case this action can be maintained by the plaintiff union even though it is brought to recover vacation pay, which would be uniquely personal claims of the individual employees.

In the Smith case the petitioner individually, and as assignee of certain other employees who were members of a labor organization having a collective bargaining contract with the defendant newspaper publisher, brought suit in the Circuit Court of Wayne County, Michigan, to recover certain wage claims for the petitioner and other employees, charging that during a strike certain non-union employees were paid full wages even though there was no work available, while refusing to pay wages to the union members, in violation of a clause in the collective bargaining agreement providing there should be no discrimination against any employee because of his membership or activities in the union.

The case was dismissed by the Wayne Circuit Court on the grounds that the allegations, if true, would make out an unfair labor practice under the National Labor Relations Act and hence the matter was within the jurisdiction

of the National Labor Relations Board. The Michigan Supreme Court affirmed this decision and certiorari was granted by the Supreme Court of the United States. The Supreme Court held that the authority of the National La- [fol. 17] bor Relations Board to deal with an unfair labor practice which also violates a collective bargaining agreement was not displaced by Section 301 of the Labor Management Relations Act of 1947, as amended, nor does it destroy the jurisdiction of the courts in suits brought under that section. It was then urged that a suit by an employee to collect wages in the form of damages is not among those suits in violation of contracts between the employer and a labor organization as provided in Section 301 and that, therefore, the court would not have jurisdiction to enforce these rights because they would be considered uniquely personal rights arising from the separate hiring contracts between the employer and each employee. The Supreme Court held, however, that the underpinnings of Westinghouse and its holding was no longer authoritative that uniquely personal employee rights could not be recovered under Section 301 and held that the individual employees could maintain an action under Section 301 to enforce these personal rights where they were founded in part on a collective bargaining agreement. It seems to the Court here that although the Smith decision did not go so far as to hold that a union could enforce these personal rights for an employee under Section 301, by holding that the individual employees could enforce such rights under Section 301 the Supreme Court would have little hesitancy in holding that in a proper case a labor union itself could enforce the personal rights of a wage claim of the individual employee under Section 301. In view of the language used in the Smith case on this subject the Court is constrained to hold that the plaintiff union in this case could maintain this action on behalf of the individual former employees of the defendant to recover their alleged individual wage claims under Section 301 of the Labor Management Relations Act of 1947, as amended, and that, therefore, this Court does have jurisdiction of the subject matter of this cause. For this rea-

son, that part of defendant's motion to dismiss the complaint herein is overruled.

With references to the second part of the defendant's motion to dismiss, or motion for summary judgment if it be so considered, on the ground that the complaint shows on its face that the causes of action sought to be enforced herein are barred by the Indiana statute of limitations is well taken and this part of defendant's motion must be sustained.

[fol. 18] It is well settled that the collective bargaining agreement between a union and an employer does not create a contract of employment with the individual employees. As was stated by the Supreme Court in the case of *J. I. Case Co.* v. *National Labor Relations Board,* (1944), 312 U. S. 332, 64 S. Ct. 576, at page 579, no individual employee has a job by reason of the collective bargaining agreement and no obligation to any individual comes into existence from such collective bargaining agreement. After a collective bargaining agreement is made the individuals who will benefit by it are identified by individual hirings. In other words, the right of the individual to vacation pay or other wages from an employer arises from his employment contract with the employer and not by virtue of the collective bargaining agreement. This rule was also expressed in *Kosley* v. *Goldblatt Bros.,* (1958) Cir. 7, 251 F. 2d 558, where the court at page 560 said:

> "An employee has always had a right to bring suit in a court to recover wages claimed to be owing him from his employer. As the court said in Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 460, 75 S. Ct. 489, 500, 99 L. Ed. 510: 'The employees have always been able to enforce their individual rights in the state courts.' Such an action is based upon a hiring contract between the employer and the employee. While the contract between the employees' union and the employer may determine the rate of wages of the employee, the latter's right of action is not superseded by the employer-union agreement. An employee may enforce his claim

for back wages by suing in a state court, or in a federal court where there is present diversity of citizenship and the required amount is involved."

Thus it is clear and it is shown on the face of the complaint, disregarding the affidavit filed in support of defendant's motion to dismiss, that the individual employment contracts of the defendant's former employees, for which the plaintiff union seeks to recover vacation pay, were employment contracts which were partly oral and [fol. 19] partly in writing, the oral part being the employment itself and the written part being the reference to the collective bargaining agreement between the plaintiff union and defendant which determined the rates of pay and the alleged vacation rights. Under these circumstances it is the Court's opinion that *Burns Indiana Statutes, 1946 Replacement,* Section 2-601 (Supp.) which provides that no action may be commenced on a contract not in writing after six years from the date the cause of action arose would apply in this case inasmuch as the complaint on its face shows the causes of action of the individual former employees of the defendant arose on the 1st day of June, 1957, when the defendant dismissed all of said former employees, and that this action was not brought until April 8, 1964, more than six years thereafter.

We feel that two cases decided by the Court of Appeals for the Seventh Circuit are quite determinative of the action in this case and, under the decisions, that the individual employee's claims for vacation pay herein have been barred by the Indiana statute of limitations. In the case of *Kordewick* v. *Indiana Harbor Belt R. Co.* (CCA 7) 157 F. 2d 753, cert. den. 67 S. Ct. 502, the court in discussing the Illinois statute of limitations on contracts which were partially written and partially verbal held that the statute barring parol contracts applied. In this case individual employees brought an action against the employer alleging a breach of a written union contract between the employer and the union. The court at pages 754 and 755 discussed the effect of the contract and found that it was

a contract partially oral and partially in writing and, therefore, was considered an oral contract so as to be barred by the statute of limitations governing parol contracts, and said:

> "Many years ago the Supreme Court of Illinois said: 'A contract cannot be said to be in writing unless the parties thereto, * * * can be ascertained from the instrument itself. If the party to a written contract is not named therein, * * * the agreement is only partly reduced to writing, because parol proof must be resorted to in order to show with whom the bargain was [fol. 20] made.' The Railway Passenger & Conductors Benefit Ass'n v. Loomis, 142 Ill. 560, 567, 32 N.E. 424, 426. And in Mowatt v. City of Chicago, 292 Ill. 578, 582, 127 N.E. 176, 177, the court, after saying 'that a written contract is one in which all of its terms are in writing; that a contract partly in writing and partly oral is in legal effect an oral contract,' held that if parol evidence must be introduced to sustain the action the contract is not in writing under Sec. 17 of the Statute of Limitations. See also Novosk v. Reznick, 323 Ill. App. 544, 551, 56 N.E. 2d 318, and Orminski v. Hyland Electrical Supply Co., 326 Ill. App. 392, 62 N.E. 2d 14; Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co., 7 Cir., 111 F. 2d 875, cited by plaintiffs, is not opposite.
>
> "As we have observed, the contract upon which plaintiffs rely was entered into between the General Managers Committee and the Brotherhood of Railroad Trainmen. The complaint was filed on November 9, 1945. The claimed violations began August 13, 1926, and ended on December 12, 1938. Plaintiffs are not named in the contract and parol evidence would be necessary, therefore to show the existence of any contractual relationship between plaintiffs and defendant, and to show that plaintiffs are or were at any time employed by defendant, and if plaintiffs had been employed by defendant, parol evidence would be necessary to show that plaintiffs had been employed in

the type of work covered by the agreement between the Brotherhood and the Committee. Under these circumstances, we must hold that the contract upon which recovery was sought was an unwritten contract."

A later Court of Appeals for the Seventh Circuit case, *Albrecht* v. *Indiana Harbor Belt R. Co.* (1949), 178 F. 2d 577, cert. den. 70 S. Ct. 804, involved the same union contract involved in the Kordewick case, except that in the latter case the Indiana six year statute of limitations was involved, because although the contract was made in Illinois the action was instituted in federal court in Indiana [fol. 21] and the court held that in such a case the statute of limitations of the state in which the suit was brought would control. The court pointed out that on a suit on a union contract by an individual employee such employment contract is partially oral and partially in writing and is regarded as an oral contract, and that the Indiana six year statute of limitations would apply.

Indiana has clearly held that in a case where a contract is partially in writing and partially oral the six year statute of limitations applies as it is an action on an oral contract and not one in writing. For one of the leading cases on this subject in Indiana and frequently cited see *The Board of Commissioners of Marion County* v. *Shipley*, 77 Ind. 553. In this case the county issued a written authorization for the payment of a bounty to anyone volunteering for military service. The plaintiff brought an action against the county, suing on the written contract. However, the court held that the six year statute applied because the contract was partially oral and partially in writing. At page 555 the court said:

"A contract can not be said to be in writing within the meaning of section 211, above noticed, so as to run twenty years, unless the parties thereto, as well as its entire terms and stipulations, can be gathered from the instrument itself, or from some other written instrument referred to therein, without the aid of parol evidence to ascertain either. If parol evidence has to

> be resorted to in order to ascertain the parties to a contract or its terms, the reason for extending the period of limitation to twenty years fails; and, though the contract may be partly in writing, yet, as it rests partly in parol, the six-year period of limitations applies as well as if the contract had rested entirely in parol."

This case was cited with approval and reaffirmed in *Carskaddon* v. *City of South Bend,* 141 Ind. 596, 39 N. E. 667, where at page 668 of the Supreme Court Reporter it ap- [fol. 22] proved The Board of Commissioners of Marion County v. Shipley and cited several other Indiana cases holding to the same effect. See also *19 I.L.E., Limitation of Actions,* Sec. 22, p. 17.

The mere fact that the union is bringing this action instead of the individual employees involved does not change the rule that the statute of limitations has barred this action.

It is the cause of action which is barred by the statute of limitations and not the particular person bringing the action. The cause of action here is the individual employee's claims for vacation pay and it is such claims that have been barred. These employees are the real parties in interest, as shown by the complaint herein, and the mere fact that the plaintiff union seeks to recover vacation pay on behalf of these individual employees does not change the fact that it is the individual employee's cause of action for vacation pay which is sought to be enforced and which is now barred by the statute of limitations.

19 I.L.E., Limitation of Actions, Section 8, page 11, points out that it is the cause of action that is barred regardless of who attempts to bring the action. This rule is stated as follows:

> "Limitations ordinarily run against the right of action and not the holder thereof, and, where a claim of a decedent is barred by limitations, the claim of his heirs based solely on the rights acquired from the decedent is also barred. A claim of debt, which would be

barred if made by the original creditor or claimant, will likewise be barred in the hands of a third person."

In support of this rule see the following cases:

Kennedy v. Warnica, 1894, 36 N.E. 22, 136 Ind. 161;

Hildebrand v. Kinney, 1909, 87 N.E. 832, 172 Ind. 447;

O'Connell v. Chicago Park District, 1941, 34 N.E. 2d 836, 376 Ill. 550.

[fol. 23] The individual former employees of the defendant for whose benefit this action for vacation pay alleged to be due is brought cannot circumvent the statute of limitations, which has clearly run on their claims, by having the union bring the action in their behalf, because the cause of action itself is now barred.

The Court having reached the above conclusions,

It Is, Therefore, Ordered, Adjudged and Decreed that plaintiff's complaint herein be and the same is hereby dismissed on the ground that the complaint fails to state a claim against the defendant upon which relief can be granted, for the reason that the complaint shows on its face that the causes of action upon which recovery is sought on behalf of the individual former employees of the defendant were barred by the statute of limitations of the State of Indiana, *Burns Indiana Statutes, 1946 Replacement,* Section 2-601, (Supp.), at the time this action was commenced, and that the costs of this action be taxed against the plaintiff.

William E. Steckler, Judge.

In United States District Court

Notice of Appeal—Filed November 25, 1964

Notice is hereby given that International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW-AFL-CIO, the above-named plaintiff, does hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on 12 November, 1964 in favor of Hoosier Cardinal Corporation, Appellee.

Plaintiff-Appellant prays that this Court enter its order fixing bond for costs on said appeal pursuant to Rule 73-C.

Miles & Cummings, 605 Union Title Building, Indianapolis, Indiana, Attorneys for United Automotive Workers, 8000 East Jefferson Avenue, Detroit, Michigan.

[fol. 24]

In the United States Court of Appeals

For the Seventh Circuit

No. 14945 September Term, 1964—April Session, 1965

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, Plaintiff-Appellant,

v.

Hoosier Cardinal Corporation, an Indiana corporation, Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

Opinion—June 4, 1965

Before Schnackenberg, Knoch and Swygert, Circuit Judges.

Schnackenberg, Circuit Judge. International Union, United Automobile, Aerospace and Agricultural Implement

Workers of America (UAW), AFL-CIO, plaintiff, appeals from a judgment of the district court dismissing plaintiff's complaint because it showed on its face that the causes of action upon which recovery was sought were barred by the statute of limitations of the state of Indiana.

The complaint avers that plaintiff, hereinafter sometimes referred to as the Union, having a collective bargaining agreement wtih Hoosier Cardinal Corporation, an Indiana corporation, defendant, which required vacation [fol. 25] pay for its employees, by this action seeks to rely upon various statutes of the state of Indiana, (a) providing for the payment of wages due to employees at least weekly, Burns Ind. Stat. Ann. (1952 Repl.) § 40-104, (b) making an employer who fails for 10 days after demand to make payment therefor weekly liable for the same together with penalty and reasonable attorneys' fees, to be recovered in a civil action, Burns Ind. Stat. Ann. (1952 Repl.) § 40-105, and (c) providing liquidated damages for such failure to pay, for each day, 10% of the amount due twice each month, not exceeding double the amount of wages due, and a reasonable fee for plaintiff's attorney, as provided in Burns Ind. Stat. Ann. (1952 Repl.) § 40-102.

It is significant that in this case no recovery is sought for or on behalf of plaintiff union itself. Any recovery in this case would inure to the exclusive benefit of the individual employee in varying amounts depending upon the individual's employment contract with defendant.

The district court relied on Burns Ind. Stat. Ann. (1946 Repl.) § 2-601 (Supp.), which provides a six-year statute of limitations on accounts and contracts not in writing.

The district court noted that the complaint herein was filed on April 8, 1964, which was more than six years from June 1, 1957 when the alleged breach of employment with individual employees occurred.

We agree with and affirm the holding and judgment of the district court. Before arriving at this conclusion we have considered each of the two reasons advanced by plaintiff which seeks to demonstrate that the district court erred.

First, plaintiff contends that no state statute of limitations can bar an action under section 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185. It arrives at this conclusion by reasoning that

> "* * * it is a firm, well-established, and judicially recognized policy of Congress that insofar as concerns the application of legal principles, the resolution of labor questions under federal law should not depend in any manner upon the geographic location in which such an action arises. While the fostering of uniformity [fol. 26] in this area normally concerns substantive legal issues, procedural rules which may be dispositive of a dispute (such as the question here involved of the application of a state statute of limitations) are no less significant. The decision of the court below to impose local time limitations on a Section 301 action disturbs the national design of having a federal labor law uniformly applied. * * *"

However it should be noted that § 185 (a) deals with "suits for violation of contracts between an employer and a labor organization representing employees in an industry * * *". The case at bar is not a suit by plaintiff to recover wages due it from defendant, for the simple reason that no one contends that defendant owes any wages to the Union. Therefore we perceive that plaintiff is in error in characterizing the subject matter of this case as the resolution of a labor question. Moreover, § 185 (b) authorizes a labor organization to sue "in behalf of the employees whom it represents in the courts of the United States". There is before us actually a case by an agent to enforce the rights of individual workmen to collect from defendant vacation pay, which it is claimed was due them individually under Indiana law and for which it is clear that they individually could have brought their own suits in the state courts of Indiana. The present suit frankly characterizes the choses in action involved as existing by virtue of the statutory law of Indiana. The question of whether vacation pay is due the workmen here involved

is a question of state law. It remains a question of state law even though the terms of a bargaining agreement authorize the workmen's personal rights of action to be maintained for them by their union. The complaint seeks not only wages due for vacation pay, but also statutory penalties and attorneys' fees allowable by an Indiana statute, and thus frankly recognizes the case as a state action. Therefore it is subject to the Indiana statute of limitations.

This result is in accordance with our prior holding in *Kordewick* v. *Indiana Harbor Belt R. Co.*, 7 Cir., 157 F.2d 753 (1946), cert. den. 329 U. S. 806, where we found that such a contract was oral and thus barred by the Illinois statute of limitations.

[fol. 27] To the same effect, and involving the Indiana statute of limitations, is *Albrecht* v. *Indiana Harbor Belt R. Co.*, 7 Cir., 178 F.2d 577 (1949), where at 578, we said:

> "Although the case at bar was commenced in the District Court of Indiana, the contract nevertheless is to be interpreted under Illinois law. It must still be regarded as an oral contract. However, we must here apply the applicable Indiana statute of limitations. Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231. Federal Courts are required to give such interpretations to State statutes of limitations as are given to such statutes by the highest court of such States. Moore v. Illinois Central Railroad Co., 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089. The law of the forum determines whether the action is barred. Karvalsky v. Becker, 217 Ind. 524, 29 N.E. 2d 560, 131 A.L.R. 1074; Hobbs v. Ludlow, 199 Ind. 733, 160 N.E. 450. Burns Ind. Stats. Anno. (1933), Sec. 2-601, provide that actions on oral contracts shall be barred unless commenced within six years after the cause of action accrued.
>
> "The complaint shows on its face that the alleged violations of the contract occurred from August 13, 1926, to December 12, 1938. This action was commenced August 4, 1947. It thus affirmatively appears that this action was not commenced within the six

> years after the alleged cause of action accrued. It follows that the complaint did not state a claim upon which relief can be granted, and the complaint and action were properly dismissed."

We agree with counsel for defendant when he says in his brief that the mere fact that the Union is bringing this action instead of the individual employees involved does not change the rule that the statute of limitations has barred this action. It is the *cause of action which is barred* by the statute of limitations and *not the particular person bringing the action.* The individual former employees of the defendant for whose benefit this action for vacation pay alleged to be due is brought cannot be permitted to circumvent the statute of limitations, which has clearly barred their claims, by having the Union bring the action in their behalf.

[fol. 28] Inasmuch as the recovery sought in the case at bar is solely for the benefit of individual employees, we cannot escape the conclusion that the presence of the Union as the plaintiff cannot justify the maintenance of this action which really belongs to the individual employees, as against the defense of the Indiana statute of limitations of six years.

Secondly, we reject plaintiff's contention that, if any state statute of limitations applies, this case would be governed by Indiana's 20-year statute of limitations covering actions on written contracts. As we have indicated, plaintiff's action in the district court was based upon the contracts of employment between the individual employees and defendant. There is no evidence or contention that these employment contracts were ever reduced to writing. It was for wages due under these employment contracts that the present action was brought. The 6-year statute of limitations applied to the action. The fact that the authority of the Union to bring the action on behalf of the employees is evidenced by a written agreement is of no significance in determining what Indiana statute of limitations is applicable to the action.

We have given special attention to plaintiff's reliance upon *Smith* v. *Evening News Assn.*, 371 U.S. 195 (1962). As a result thereof, it is our opinion that the result which we now reach in the case at bar is not at variance with the views expressed in the majority opinion in *Smith*.

While defendant makes two other convincing arguments in support of its position in this court, we consider it unnecessary to discuss them, because, for the reasons already given, we deem it necessary that the judgment from which this appeal was taken be affirmed. It is so ordered.

Judgment Affirmed.

[fol. 29] SWYGERT, Circuit Judge (concurring). I concur in affirmance of judgment.

[fol. 30]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Elmer J. Schnackenberg, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Luther M. Swygert, Circuit Judge.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, Plaintiff-Appellant,

No. 14945 vs.

HOOSIER CARDINAL CORPORATION, an Indiana corporation, Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

JUDGMENT—June 4, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Evansville Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

[fol. 31] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 32]

SUPREME COURT OF THE UNITED STATES

No. 387, October Term, 1965

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, Petitioner,

v.

HOOSIER CARDINAL CORPORATION.

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.